IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE CRIMINAL APPEAL NO. 3/2009

In the matter between

BONGANI KHUMALO & ANOTHER

Vs

REX

CORAM BANDA, CJ

EBRAHIM, JA MAGID, AJA

APPELLANT Present in Person

FOR THE CROWN Ms L. Hlophe

JUDGMENT

BANDA, CJ

[1] The appellant was convicted by the Principal Magistrate's Court sitting at Manzini on two counts of rape and was acquitted on the five remaining counts which charged him with one count of robbery and four counts of housebreaking with intent to steal and theft.

[2] The learned trial Magistrate took the view that the offences on which the appellant had been convicted were serious and decided to remit the case to the High Court for sentence. When remitting the case the learned Magistrate stated as follows :-

> "*The court finds that the offences for which the accused has been convicted are very serious. The complainant was attacked during the night by the accused on two different occasions. The accused broke into the complainant's house on both occasions before proceeding to rape her. The conduct of the accused persons towards the complainant has kept her in perpetual fear as she always feels unsecured with her little children. The consecutive rapes have very much humiliated and devastated the complainant mentally. For these reasons the court will refer the matter to the High Court for purposes of sentencing.*"

[3] In sentencing the appellant the learned Judge in the High Court stated as follows:-

> "*In the court* a quo *the accused person was charged and convicted of seven counts which included the crimes of rape, robbery and housebreaking with intent to steal and theft in various places in the Lubombo Region. For the sake of completeness I proceed to outline these crimes in the judgment as follows*",

And the judge proceeded to set out the charges count by count up to the seventh count. When he imposed the sentences, the learned judge in the court *a quo* found that the appellant had been acquitted and discharged on counts 5 and 7 and proceeded to sentence him on counts 1, *2*, 3, 4 and 6.

[4] It is clear that the learned judge in the court *a quo* imposed the sentences as he did *per incuriam.* The appellant was only convicted on counts 1 and 2 and had been acquitted on all the remaining five counts. This is patently clear from pages 70 - 71 of the learned Magistrate's judgment where he stated as follows:-

> *"On count 3 the complainant PW2 pointed at Al as the person who robbed her. The court has taken into account that the offence was committed at about 4.30 AM. This was during winter (in June). It is common cause that at 4.30 A.M. during this season, it is dark and may be difficult to clearly identify a person especially if one is seeing the person for the first time.*

The court has found it not safe to rely on the allegation ofPW2 that she was able to identify A1 very well. It was important for the police to conduct an identification parade so that PW2 would identify A1 from many other people. Perhaps this would have persuaded the court that PW2 had seen her assailant. I find that in this offence the identity ofAl as a culprit has not been proved beyond a reasonable doubt. I find him not guilty. He is acquitted and discharged. This is the same with the offence on count 4 where PW5 tpld the court that he saw Al "inside her house taking items from a wall unit." PW5 had just woken up from sleeping. The thief hit her with a ceramic utensil and ran away. Everything occurred swiftly. I have a doubt in my mind that PW5 was able to see her assailant well especially because she was seeing her for her first time. Again it would have assisted if the police had arranged for an identification parade. The court finds that the crown has not been able to prove its case beyond any reasonable doubt in this case. Al is found not quiltu. He is acquitted and discharged. On count 5 the complainant did not see the thief She only identified her radio after sometime at the police station. This radio was found in possession of A2 according to PW9's evidence. Nothing connects Al with the commission of this offence. I find him not guiltu. He is acquitted and discharged."

"....on count 6 none of the accused person was connected with the commission of the offence in evidence. Both are found not guilty. They are acquitted and discharged. On count 7 nothing links Al with the commission of this offence. He is acquitted and discharged....."

That part of the learned Magistrate's judgment makes it clear that the appellant was acquitted and discharged on all except the rape charges. Indeed in the statement of the learned Magistrate which he made when remitting the case to the High Court for sentence he only referred to the charges of rape. I find, therefore, that the sentences often (10) years imposed on counts 3, 4, and 6 were wrong in principle as the appellant had not been convicted on the three counts.

After properly directing his mind to the mitigating factors which had been raised on behalf of the appellant the learned judge imposed a term of imprisonment of fifteen (15) years on each count of rape and ordered them to run concurrently. It is a settled principle of law that the imposition of a sentence is a matter which is within the discretion of a trial court. This is an appellate court and can only interfere with the sentence of a trial court if there was a misdirection which results in a failure of justice or it is a sentence which is wrong in principle or it is manifestly harsh or induces a sense of shock. See the case of **Sam Du Pont vs Rex** Criminal Appeal No. 4/2008 (unreported).

[7] A sentence of 15 years for rape though severe is, in my judgment, a proper one in the circumstances of this case. The appellant broke into the house of the complainant on both occasions before he proceeded to rape her. In the result the order of the court is as follows:-

(i) The sentences imposed on counts 3, 4 and 6 are set aside.

(ii) The sentences imposed on counts 1 and 2 are hereby confirmed.

[8] The appeal only succeeds to the limited extent indicated in this judgment.

Delivered in open court at Mbabane on this 18th day of May, 2009

R.A. BANDA, CJ

I agree

A.M. EBRAHIM, JA

I agree

P.A.M MAGID AJA